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June 14, 2023

The Honorable Margo K. Brodie
United States District Court
Eastern District of New York
225 Cadman Plaza East
Brooklyn, NY 11201

Re: *In re Payment Card Interchange Fee and Merchant Discount Antitrust Litigation*, Case No. 05-md-01720 (E.D.N.Y.) (MKB) (JO)

Dear Judge Brodie:

In its minute entry following the May 11, 2023 status conference, the Court stated that it will consider requests from counsel to be appointed to represent the franchisees as a class. Counsel for Jack Rabbit has submitted an application to serve as counsel for a subclass of retail gas station franchisees. Counsel for Old Jericho has filed a memorandum opposing Jack Rabbit's application and, more generally, opposing appointment of any separate counsel for oil and gas retailers in *Illinois Brick* repealer states.

Although the aforementioned counsel are focused on the representation of branded convenience store operators, there are also millions of franchisees that operate franchises in other industries, i.e. restaurants, health clubs, automotive and cleaning and maintenance businesses.¹ These franchisee class members also have an interest in the Special Master process and in ensuring that their interests are protected.

Undersigned counsel intends to submit an application for appointment as subclass counsel for all franchisees. To that end, we have been speaking with franchise businesses and organizations with operations in areas outside of the branded gas station business, and we intend to submit a coordinated proposal to this Court to ensure that the interests of all franchisees can be heard and evaluated before any counsel for franchisees is appointed, or before the Court considers whether to appoint such counsel.

¹ Franchised businesses comprise a large portion of the settlement class. According to the 2017 Economic Census Franchise Statistics Report, roughly 11 percent of all businesses in the United States are franchises, and more than 25% of these are quick service restaurants.

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Many of our convenience store clients also own restaurant franchises. The payment processing dynamic related to branded gas station operations and franchised restaurant operations present similar issues. We believe we can propose representation for the franchisee subclass that will enable the Court to move forward with counsel that is experienced and qualified to represent all franchisee groups. We simply need more time to coordinate with the relevant franchisee organizations before putting forth a proposal.

We have asked counsel for Old Jericho, Jack Rabbit, Class Counsel and the Defendants if they would agree to allow us more time to present a unified application for subclass counsel. We shared a draft copy of this letter with the aforementioned counsel before filing. The Defendants do not object to our request for more time to coordinate with other franchisees. Class counsel and counsel for Old Jericho and Jack Rabbit objected because they believe these issues should be resolved more quickly. Jack Rabbit's counsel proposed a schedule of two weeks that we believe provides insufficient time for other franchisees to present their views to the Court. Counsel for Old Jericho stated that they believe their motion to intervene should be decided before any leadership motion is made or decided, which seems to contradict their basis for objecting to our request for more time in the first instance.

We believe that the Court should appoint a Special Master and should then consider appointment of counsel for the franchisees -- once other franchisee groups have had an opportunity to present their views. We will report back to the Court in no later than 30 days with respect to the status of our efforts to coordinate with other franchisee groups and organizations to prepare and submit a joint motion for appointment as subclass counsel.²

Although other counsel have jumped the gun and appear to already be making substantive arguments relating to franchisee recovery, we believe any such argumentation is premature and inappropriate. The suggestion by Jack Rabbit's counsel that a class-wide determination on "Cost-Plus" recovery can somehow now be made (ECF 8843) demonstrates counsel's lack of experience with this industry and their lack of understanding of the credit card operations of any convenience store operator other than Jack Rabbit.³ The contract that Jack Rabbit's counsel has put forth has no resemblance to any contract we have seen for any other operator. Similarly, Old Jericho's claim, in the abstract, that a determination as to any particular oil and gas franchisee's claim can be based just on a review of contracts is wholly misplaced.

² If the Court intends to set a deadline for leadership motions, before we have reported back to the Court in no later than 30 days, then we request that the Court set an outside deadline of July 25. The settlement will be final as of that date, if no petitions for cert are filed.

³ In addition, as we will explain in our motion for appointment as subclass counsel, Jack Rabbit's contention, also made at the status conference, that Fikes retailers are not proper class members or representatives is factually and legally inapposite.

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More importantly, these issues are not ripe for resolution now and should await the appointment of subclass counsel that can represent the interest of class members seeking recovery from the settlement. To the extent that Class Counsel has indicated that they believe appointment of franchisee counsel is premature at this time, we agree, as the Court should have the opportunity to consider the views of franchisee class members outside of the oil and gas business. However, we believe it will be necessary to appoint such counsel before the Claims Administrator and Special Master begin reviewing and considering any claims.

Very truly yours,

/s/ Jana Eisinger

Jana Eisinger

cc: All counsel of record via ECF